

PUBLIC VERSION

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554**

In the Matter of)	
)	
Worldcall Interconnect, Inc.)	Proceeding No. 14-221
a/k/a Evolve Broadband,)	Bureau ID No. EB-14-MD-011
)	
Complainant,)	
)	
v.)	
)	
AT&T Mobility, LLC,)	
)	
Defendant.)	

APPLICATION FOR REVIEW OF WORLDCALL INTERCONNECT

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TABLE OF CONTENTS

EXECUTIVE SUMMARY	iii
I. BACKGROUND AND PROCEDURAL HISTORY	1
II. QUESTIONS PRESENTED FOR REVIEW	6
III. STANDARD OF REVIEW	6
IV. RELIEF SOUGHT	6
V. ERROR 1: The Bureau erred by refusing to apply and enforce the automatic roaming rule.	7
VI. ERROR 2: The <i>Order</i> erred by limiting its assessment of AT&T's proposed rates to only AT&T's most expensive agreements.	13
VII. ERROR 3: The <i>Order</i> erred by holding that WCX failed to demonstrate that AT&T's proposed rates substantially exceed retail rates.	17
VIII. ERROR 4: The Bureau erred by requiring that WCX present evidence the Commission itself has found is difficult to locate and analyze.	23
IX. CONCLUSION	24
CERTIFICATE OF SERVICE	25

EXECUTIVE SUMMARY

The Enforcement Bureau's recent *Order* concluding WCX's roaming complaint sets a precedent that nullifies the automatic roaming rule. WCX requested roaming on AT&T's LTE network for both its commercial mobile data service *and* its interconnected services. When AT&T failed to offer reasonable rates and terms, WCX filed a complaint alleging violations of the automatic roaming rule (47 C.F.R. § 20.12(d)) *and* the commercial mobile data service roaming rule (47 C.F.R. § 20.12(e)). However, the *Order* refused to enforce the automatic roaming rule and instead only applied Section 20.12(e). As a result, LTE networks (and all future generation networks) will only be subject to the commercial mobile data service roaming rule. The automatic roaming rule has been eliminated and, with it, Title II regulation of interconnected services on LTE networks. The *Order* must be reversed in order to preserve the automatic roaming rule.

The *Order* further erred in its application of the commercial mobile data service roaming rule. The Bureau refused to consider relevant evidence from WCX showing that AT&T's proposed rates substantially exceed retail rates and violate Section 20.12(e). Instead, the Bureau held that the exorbitant rates in AT&T's existing roaming agreements – including the very same agreements that necessitated the *Data Roaming Order* – are presumptively commercially reasonable. However, the *Data Roaming Order* was issued specifically because AT&T refused to provide commercially reasonable roaming. The *Order* has now sanctioned AT&T's past conduct, which the Commission sought to eliminate with Section 20.12(e). As a result, commercially unreasonable rates and terms will be perpetuated and the goals of the *Data Roaming Order* will not be achieved.

If the *Order* stands, competition in the mobile services market will be foreclosed to all but the major nationwide providers. Small carriers like WCX cannot compete with the major providers for anything other than legacy voice, texting and other low-consumption specialized services if the roaming price is many times higher than the retail price AT&T advertises to a person off the street. WCX respectfully requests that the Commission reverse the *Order*'s holding that WCX did not carry its burden of showing that AT&T's rates are commercially unreasonable. The Commission should further hold that the automatic roaming rule applies to interconnected services provided over LTE and remand WCX's complaint with the instruction that the Enforcement Bureau determine whether AT&T's proposed rates and terms for LTE roaming are just and reasonable.

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APPLICATION FOR REVIEW OF WORLDCALL INTERCONNECT

Pursuant to 47 C.F.R. § 1.115, Worldcall Interconnect, Inc. (“WCX”) respectfully submits this application for review of the *Order* issued by the Enforcement Bureau of the Federal Communications Commission (“Commission”) on September 22, 2016 in the above-captioned proceeding, which incorporated and made final the rulings of the Bureau’s *Interim Order* of April 14, 2016.¹ This application is timely filed in accordance with 47 C.F.R. §§ 1.115(d), 1.4(e)(1), and 1.4(j).

I. BACKGROUND AND PROCEDURAL HISTORY

WCX provides 4G LTE services in Cellular Market Area (“CMA”) 667, which covers a rural area of Texas between Houston, Austin and San Antonio. WCX holds a lower B Block 700

¹ See Order of Christopher Killion, Chief, Market Disputes Resolution Division, Enforcement Bureau, Federal Communications Commission, Proceeding No. 14-221, File No. EB-14-MD-011 (rel. Sep. 22, 2016) and Order of Christopher Killion, Chief, Market Disputes Resolution Division, Enforcement Bureau, Federal Communications Commission, Proceeding No. 14-221, File No. EB-14-MD-011 (rel. April 14, 2016) (collectively, “the *Order*”).

MHz license for CMA 667 and provides its LTE services in Band 17.² WCX is also authorized to provide nationwide service using the 3650 MHz frequency.³ WCX has developed technology to offer differentiated LTE-based services over unlicensed and light-licensed radio access networks and continues to innovate in this area.⁴

Over five years ago, in June of 2011, WCX formally requested a roaming arrangement with AT&T and the parties initiated negotiations.⁵ WCX experienced many of the same difficulties during negotiations the Commission identified in its roaming orders.⁶ AT&T informed WCX that it would not roam on WCX's network so the negotiations focused on the conditions under which WCX's customers would roam on AT&T's network.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Rather than pursue a formal complaint immediately, WCX began building out its LTE network and providing service to

² Feldman Decl. at ¶ 5.

³ See <http://wireless2.fcc.gov/UlsApp/UlsSearch/license.jsp?licKey=3000137>.

⁴ WCX Resp. to AT&T Interrogatory No. 4 (Jun. 19, 2015).

⁵ Feldman Supp. Decl. at ¶ 14(f).

⁶ See e.g., *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, Second R&O, 26 FCC Rcd 5411, at ¶¶ 23-27 (2011) (“Data Roaming Order”); *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, Order on Recon. and Second FNPRM, 25 FCC Rcd 4181 at p. 2, ¶ 26 and n. 69 (2010) (“Automatic Roaming Order Reconsideration Order”).

[REDACTED]

customers.¹⁰ WCX contacted AT&T to restart negotiations in June of 2014.¹¹ The negotiations were unsuccessful, so WCX filed the instant formal complaint in September, 2014.¹²

All of WCX's services – those that have always met the definition of “interconnected” and its mobile broadband Internet access service (which was not “interconnected” until the Commission changed the rules in the *Open Internet Order*¹³) – are based on and comply with GSMA standards.¹⁴ WCX's users will make and receive voice calls, send and receive texts, and (if not blocked because the roaming price is too high) enjoy mobile broadband Internet access when they roam on AT&T's network.¹⁵ WCX needs automatic roaming for interconnected voice and data services and text messaging, with just, reasonable and nondiscriminatory terms and prices. WCX also requires an arrangement for commercial mobile data service for its non-interconnected mobile broadband Internet access service (*i.e.*, commercial mobile data service) at a commercially reasonable price.¹⁶

WCX's complaint alleged that AT&T violated the automatic roaming rule (47 C.F.R. § 20.12(d)) and the commercial mobile data service roaming rule (47 C.F.R. § 20.12(e)) by failing to offer roaming terms that are just, reasonable and non-discriminatory (automatic roaming), or

¹⁰ Second Amended Compl. at ¶¶ 25-29.

¹¹ Feldman Supp. Decl. at ¶ 14(l).

¹² Order at note 24.

¹³ *Protecting and Promoting the Open Internet*, R&O on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601 (2015) (“*Open Internet Order*”). The *Open Internet Order* held that provision of commercial mobile data service (*i.e.*, broadband Internet access) would prospectively be treated as “interconnected” and therefore common carrier like other interconnected data services had been for many years. See *Open Internet Order* at ¶391 n. 1151. This case, however, is being handled under the old rules and definitions because the Commission delayed implementation in the roaming context.

¹⁴ Feldman Reply Decl. at p. 80.

¹⁵ Second Amended Compl. at p. 4. See also Feldman Decl. at ¶¶ 5 and 22. WCX's network can, however, operate in backwards-compatible fashion and fall back to AT&T's 2G and 3G access networks if necessary.

¹⁶ Feldman Reply Decl. at p. 3, ll. 15-19.

commercially reasonable (commercial mobile data service roaming).¹⁷ The *Data Roaming Order* endorsed complaints brought under both rules.¹⁸

The Enforcement Bureau issued an interim order (“the *Order*”) on April 14, 2016 that claims to rule on two issues,¹⁹ but in fact resolves several contested matters. For example, even though WCX and AT&T both offer interconnected services and WCX alleged a violation of the automatic roaming rule,²⁰ the *Order* refused to apply and enforce Section 20.12(d) and its accompanying just and reasonable standard. Instead, it limited its analysis to the commercial reasonableness standard set out in Section 20.12(e).²¹ The *Order* then held that (1) WCX did not demonstrate that AT&T’s proffered rates are commercially unreasonable,²² and (2) WCX is only entitled to obtain roaming arrangements for customers to whom it provides facilities-based services.²³ The parties subsequently resolved all remaining outstanding issues through negotiation, with the understanding that WCX would apply for review of the *Order* once it became final.²⁴ The *Order* was put in final form on September 22, 2016.²⁵

¹⁷ Second Amended Compl. at p. ii (“This case involves AT&T’s obligation to provide ‘data roaming’ on ‘commercially reasonable’ terms under FCC rule 20.12(e), and AT&T’s rule 20.12(d) obligation to provide ‘automatic roaming’ on reasonable and not unreasonably discriminatory terms and conditions, pursuant to Sections 201 and 202.”). See also Second Amended Compl. at ¶ 41 (list of AT&T’s substantive violations).

¹⁸ *Data Roaming Order* at ¶ 75.

¹⁹ *Order* at ¶ 1 (“[W]e address the merits of two key issues in dispute....”).

²⁰ Second Amended Compl. at ¶ 41.

²¹ *Order* at ¶ 12 and n. 32 (“Accordingly, in this Order we address the disputed issues under the data roaming rule in Section 20.12(e) rather than the ‘automatic roaming’ rule in Section 20.12(d)”).

²² *Id.* at ¶¶ 18-28.

²³ *Id.* at ¶¶ 13-17.

²⁴ See Order of Christopher Killion, Chief, Market Disputes Resolution Division, Enforcement Bureau, Federal Communications Commission, Proceeding No. 14-221, File No. EB-14-MD-011 (rel. Sep. 22, 2016) at ¶ 2.

²⁵ *Id.*

WCX hereby seeks timely review of the Bureau's refusal to apply the automatic roaming rule and the holding that WCX did not show AT&T's rates to be commercially unreasonable. WCX does not seek review of the ruling that it may secure roaming only for customers to whom it provides facilities-based service. WCX has always agreed that roaming is only available to facilities-based carriers.²⁶ The actual disagreement regarded the restrictive manner in which AT&T's terms appeared to expand that criterion beyond what the Commission intended. The negotiated final terms, however, incorporate statutory and rule-based definitions for key terms related to mobile service and allow WCX to use its own technology to expand its own facilities-based services outside of CMA 667 using the full range of spectral alternatives. WCX therefore has no need to challenge the ruling in Part III.A of the *Order*, except insofar as it fails to apply Section 20.12(d) and focuses only on Section 20.12(e).

The *Order* erred by ruling that WCX failed to demonstrate that AT&T's rates are commercially unreasonable. AT&T's rates are so substantially in excess of retail rates that they are tantamount to a refusal to provide roaming and constitute an unreasonable restraint of trade. WCX will not be able to offer mobile broadband Internet access to its customers when they roam on AT&T's network, and WCX will have to limit its customers to only low consumption interconnected services like voice, texting, and custom-designed lower-bandwidth specialty applications. In other words, WCX will only be able to offer nationwide services that entail automatic roaming and WCX users will not be able to enjoy WCX's wireless broadband Internet access (commercial mobile data service) when they are roaming on AT&T's network.

²⁶ See e.g., Second Amended Compl. at ¶¶ 18-19.

II. QUESTIONS PRESENTED FOR REVIEW

WCX submits four issues for Commission review. Reversal of the *Order* on any one of them will require a remand to the Enforcement Bureau for processing consistent with the Commission's determinations.

1. Did the Bureau err by refusing to apply the automatic roaming rule (Section 20.12(d)) to AT&T's proposed terms, conditions and rates?
2. Did the Bureau err by refusing to consider the rates contained in other carriers' roaming agreements, and limiting its review to only a subset of those disclosed by AT&T?
3. Did the Bureau err by refusing to consider WCX's evidence of retail and international data rates as part of its assessment of the commercial reasonableness of AT&T's rates?
4. Did the Bureau err regarding the evidence WCX must present to carry its burden of proving that AT&T's proposed rates for commercial mobile data service roaming are commercially unreasonable under Section 20.12(e)?

III. STANDARD OF REVIEW

The Commission grants an application for review when it is shown, *inter alia*, that action taken under delegated authority conflicts with a statute, regulations, case precedent, or established Commission policy; the action involves a question of law or policy which has not previously been resolved by the Commission; or prejudicial procedural error.²⁷ The *Order* conflicts with the Commission's roaming rules, implementing orders, and stated policies related to roaming. The Commission must reverse the *Order* and remand WCX's complaint to the Bureau for further action that is consistent with the Commission's rules, orders and policies.

IV. RELIEF SOUGHT

WCX respectfully requests that the Commission reverse (1) the Bureau's refusal to apply and enforce the automatic roaming rule; and (2) the *Order*'s holding that WCX failed to demonstrate that the rates offered by AT&T are commercially unreasonable. The Commission

²⁷ 47 C.F.R. § 1.115(b)(2).

should remand with instructions that the Bureau determine whether AT&T's rates are consistent with the automatic roaming rule, 47 C.F.R. § 20.12(d). The Commission should further instruct the Bureau to consider the totality of the circumstances, including retail and international data rates, and the rates contained in other carriers' agreements when assessing AT&T's proposed rates for commercial mobile data service roaming.

V. ERROR 1: The Bureau erred by refusing to apply and enforce the automatic roaming rule.

The Bureau erred by refusing to apply and enforce the automatic roaming rule (Section 20.12(d)) with regard to AT&T's proposed rates, terms and conditions. WCX asserted in its complaint and at every stage that it seeks automatic roaming for interconnected voice and data services and text messaging.²⁸ AT&T offers interconnected voice and data service to its own customers,²⁹ so it is subject to Section 20.12(d).³⁰ WCX is "a technologically compatible facilities-based CMRS carrier"³¹ that provides interconnected voice and data services.³² WCX is

²⁸ See e.g., Second Amended Compl. at p. ii ("This case involves AT&T's obligation to provide 'data roaming' on 'commercially reasonable' terms under FCC rule 20.12(e), and AT&T's rule 20.12(d) obligation to provide 'automatic roaming' on reasonable and not unreasonably discriminatory terms and conditions, pursuant to Sections 201 and 202."); Reply at ¶ 48 ("WCX is seeking both automatic roaming under 20.12(d) (for WCX's interconnected services) and data roaming under 20.12(e) (for WCX's non-interconnected services)."); WXC Initial Br. at p. 2 ("WCX is also seeking and has a right to 'automatic roaming' under Rule 20.12(a)(2) and (d) because interconnected voice and data services are involved."); and WCX Reply Br. at p. 2 ("This Complaint involves the automatic roaming rule and the data roaming rule.").

²⁹ Feldman Supp. Decl. p. 12.

³⁰ 47 C.F.R. § 20.12(d) ("[I]t shall be the duty of each host carrier ... to provide automatic roaming to any technologically compatible, facilities-based CMRS carrier on reasonable and not unreasonably discriminatory terms and conditions, pursuant to Sections 201 and 202 of the Communications Act, 47 U.S.C. 201 and 202.").

³¹ Feldman Decl. at p. 2; Feldman Supp. Decl. at pp. 8 and 12.

³² Feldman Decl. at pp. 2 and 26; Feldman Supp. Decl. (Oct. 2, 2014) at p. 5; and Feldman Supp. Decl. (Jul. 24, 2015) at pp. 8 and 12 and Exh. E.

therefore expressly allowed to “on behalf of its subscribers, request automatic roaming service”³³ from AT&T pursuant to Section 20.12(d) so that its users can enjoy their WCX-supplied interconnected voice and data services when WCX’s network is not available. The *Order*’s failure to apply the automatic roaming rule to WCX’s request for automatic roaming conflicts with the Commission’s regulations, case precedent and established Commission policy.

The commercial mobile data roaming rule did not replace the automatic roaming rule; it instead added a new, parallel roaming obligation for providers of *non-interconnected* mobile broadband Internet access (*i.e.*, commercial mobile data services).³⁴ The *Data Roaming Order* recognized that “some roaming disputes will involve both data and voice and are likely to have factual issues common to both types of roaming.”³⁵ The commercial mobile data roaming rule “complement[s] the current roaming rules applicable to interconnected services....”³⁶ Two concurrent roaming rules “improve efficiency of spectrum use, encourage competition and increase sharing opportunities between private mobile services and other services.”³⁷

A carrier may “bring a single proceeding to address such a dispute, rather than having to bifurcate the matter and initiate two separate proceedings under two different sets of procedures.”³⁸ This is precisely what WCX has done. The complaint simultaneously alleged that AT&T has (1) violated the automatic roaming rule by refusing to offer roaming for interconnected services on just and reasonable terms and rates, and (2) violated the commercial mobile data roaming rule by failing to offer roaming for commercial mobile data service on

³³ See 47 C.F.R. § 20.3, definition of “Host Carrier” (“A facilities-based CMRS carrier may, on behalf of its subscribers, request automatic roaming service from a host carrier.”)

³⁴ *Data Roaming Order* at note 1.

³⁵ *Id.* at ¶ 75.

³⁶ *Id.* at ¶ 67.

³⁷ *Id.*

³⁸ *Id.*

commercially reasonable rates and terms.³⁹

The *Order* cited several reasons for refusing to apply the automatic roaming rule, all of which indicate the Bureau believes application of the rule is optional or WCX somehow waived its claims. In either case, the Bureau erred. WCX cannot reasonably be deemed to have waived its position that the automatic roaming rule applies because WCX expressly invoked this claim at every stage in this case.⁴⁰ WCX's complaint alleged that AT&T violated Section 20.12(d). The Bureau does not have the discretion to simply refuse to enforce the rules. The rationales expressed in the *Order* are incorrect and insufficient in any event.

The *Order's* first rationale for refusing to enforce the automatic roaming rule is that the Rural Wireless Association ("RWA") model agreement WCX proposed during negotiations supposedly "addressed only data roaming."⁴¹ The RWA agreement was titled a "data roaming agreement" because it governed LTE roaming, and LTE is a data-centric, packet-based technology that supports all kinds of applications, including voice.⁴² That is why the RWA agreement contemplated that the parties would "interconnect and deliver or receive data, voice, SMS and other information between the Parties and their Authorized Users."⁴³ There are no

³⁹ Second Amended Compl. at p. ii ("This case involves AT&T's obligation to provide 'data roaming' on 'commercially reasonable' terms under FCC rule 20.12(e), and AT&T's rule 20.12(d) obligation to provide 'automatic roaming' on reasonable and not unreasonably discriminatory terms and conditions, pursuant to Sections 201 and 202."). See also Second Amended Compl. at ¶ 41 (list of AT&T's substantive violations).

⁴⁰ See *supra* note 28.

⁴¹ *Order* at note 32.

⁴² Feldman Supp. Decl. at p. 12, ll. 9-14.

⁴³ Second Amended Compl., Feldman Decl., Exh. 1, Bates p. 71 (emphasis added). The RWA agreement is for "mobile wireless data services" and designed to implement all of "Rule 47 CFR Part 20.12." Bates p. 58. It is not limited to non-interconnected services or only Section 20.12(e). "Data Roaming" means "the provision of Data Services by one Party via a LTE Network or GSM Network to an Authorized User of the other Party pursuant to this Agreement" and "Data Services" means "digital data communication services." *Id.*, Bates p. 70. "Network" means "the totality of all non-Roaming infrastructure and technology used by a Party or its

terms within the agreement that exclude interconnected voice and data services or text messaging. The RWA agreement expressly covered interconnected services subject to the automatic roaming rule, so it was obviously not confined to roaming for non-interconnected commercial mobile data service under Section 20.12(e). The *Order* erred by refusing to enforce the rule based on the title alone, since the RWA agreement addresses interconnected services entitled to automatic roaming too.

The fixation on the title also ignores the fact that Title II “data roaming” has been available since 2000, when manual roaming for interconnected data services was first required.⁴⁴ The Commission subsequently implemented “automatic roaming” for voice and interconnected data in the *Automatic Roaming Order*, which also initiated the process that ultimately led to the *Data Roaming Order* and Section 20.12(e) in 2011. The *Data Roaming Order* did not apply Title II to “data roaming” for non-interconnected data services like mobile wireless broadband Internet access, but it *retained* Title II “data roaming” for interconnected data services. Although “data roaming” is shorthand for “roaming arrangements for commercial mobile data service,” the phrase “data roaming” does not appear anywhere in Section 20.12(e). That is because “data roaming” for interconnected data services has existed for 16 years, whereas roaming for

Affiliates to provide *various* wireless services to its own Authorized Users, *including* but not limited to any facilities or services used to interconnect and deliver or receive data, *voice*, *SMS* and other information between the Parties and their Authorized Users.” *Id.*, Bates p. 71 (emphasis added). “Serving Carrier’s roaming-related pricing and practices shall not vary depending on the specific application, service, or device being employed, or the Data Service sent-to or received-by either the Home Carrier or the Authorized Users of Home Carrier.” *Id.*, Bates p. 60. “Voice” is mentioned 6 times, and “SMS” is mentioned twice. “M2M” (which can be interconnected, and will be when provided by WCX) appears 7 times. The RWA agreement expressly covered far more than roaming for wireless broadband Internet access, and expressly extended to interconnected services subject to Section 20.12(d).

⁴⁴ *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, Third R&O and Order and MO&O on Recon., 15 FCC Rcd 15975, 15981-83, ¶¶ 18, 22-24 (2000)(“*Manual Roaming Reconsideration Order*”).

commercial mobile data service has been available for only 5 years.

The *Order* next justified refusing to apply the automatic roaming rule because WCX stated it would “largely analyze the issues by applying the lower ‘commercially reasonable’ standard....”⁴⁵ However, the quoted portion is not the complete sentence, as the ellipsis indicates. The omitted part of the quoted sentence expressly invoked the automatic roaming rule:

...but WCX asserts, and does not waive, the contention that AT&T has rule 20.12(d) duties, must provide “automatic roaming” and its terms must also be reasonable and not unreasonably discriminatory pursuant to §§201 and 201, since WCX will be using roaming to provide “interconnected” voice and data services along with text-messaging.⁴⁶

WCX spent more time on the commercial reasonableness of AT&T’s terms because proving a violation of the data roaming rule’s lower legal standard necessarily also demonstrates a violation of the automatic roaming rule’s much higher just and reasonable standard. Furthermore, AT&T never contended that its proposed terms and rates satisfied the automatic roaming rule and it never presented any evidence to rebut WCX’s *prima facie* case. There was little need to expend much argument on this aspect of the complaint since AT&T basically conceded that it would lose if the automatic roaming rule applies.

The *Order* also refused to apply the automatic roaming rule because [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

⁴⁵ *Order* at note 32.

⁴⁶ Second Amended Compl. at ¶ 21.

⁴⁷ *Order* at note 32. *See also Order* at note 49 (“Inasmuch as WCX only took issue with the “per MB” data rates we evaluate here only the parties’ disputed data roaming rates.”).

The Enforcement Bureau seems to think LTE networks are subject to only the commercial mobile data service roaming rule even when interconnected services are indisputably involved. There is no support for this notion in the *Data Roaming Order* and it is contradicted by the Commission's stated intent that the two rules operate in a complementary fashion.⁵¹ Furthermore, solely applying the commercial mobile data service roaming rule to LTE services would turn the automatic roaming rule into a dead letter due to advances in technology. Yet the Commission was clear in the *Data Roaming Order* that it intended to preserve automatic roaming when all mobile services transition to data applications.⁵²

AT&T should have been required to bear the burden of proving that its proposed terms are "reasonable and not unreasonably discriminatory" under §§ 201 and 202 insofar as roaming for WCX's interconnected services are involved. The Bureau was required to presume that WCX's request is reasonable.⁵³ AT&T never attempted to rebut the presumption regarding WCX's request and it never tried to show that its terms were just and reasonable with regard to interconnected voice and data services. The Bureau impermissibly let AT&T entirely off the hook by refusing to even consider WCX's automatic roaming claims. The Commission should reverse the *Order* and remand WCX's complaint with instructions to review AT&T's proposed terms under Section 20.12(d).

VI. ERROR 2: The *Order* erred by limiting its assessment of AT&T's proposed rates to only AT&T's most expensive agreements.

The Bureau also erred by holding that WCX did not meet its burden of demonstrating the

⁵¹ *Data Roaming Order* at ¶ 41 ("The rule adopted herein will complement the current roaming obligation in Section 20.12 and cover mobile services that fall outside the scope of that obligation.").

⁵² *Id.* at ¶ 28.

⁵³ 47 C.F.R. § 20.12(d) ("The Commission shall presume that a request by a technologically compatible CMRS carrier for automatic roaming is reasonable pursuant to Sections 201 and 202 of the Communications Act, 47 U.S.C. 201 and 202. ...").

commercial unreasonableness of AT&T's proposed rates. The Bureau reached this incorrect conclusion by deeming AT&T's most expensive data roaming agreements to be the only relevant benchmark for commercial reasonableness. The Bureau refused to assess AT&T's proposed rates against either its "strategic agreements" or WCX's recent roaming agreement with [REDACTED] [REDACTED] which should have been the most important and relevant data point for the Bureau's analysis.

According to the *Order*, "the data roaming rates in the roaming agreements that AT&T has submitted in this proceeding ... are highly probative of the commercial reasonableness of AT&T's proposed data roaming rates."⁵⁴ This collection of roaming agreements, however, did not constitute all of AT&T's existing data roaming agreements. AT&T omitted its "strategic agreements" with the lowest rates from the comparison, but included its oldest and most expensive pre-*Data Roaming Order* agreements.⁵⁵ As a result, the Bureau used an inflated representation of AT&T's data roaming rates as a benchmark for commercial reasonableness.

The Bureau's deference to AT&T's existing agreements was error because it effectively created a presumption of reasonableness in those agreements' rates and then required WCX to rebut that presumption. Yet the *T-Mobile Declaratory Ruling* made clear that a presumption of reasonableness will only be applied to agreements involving the same parties.⁵⁶ Commercial mobile data roaming agreements to which WCX was not a party cannot constitute the sole basis for commercial reasonableness in this complaint, but that is precisely the approach used in the

⁵⁴ *Order* at ¶ 23.

⁵⁵ Orszag Supp. Decl., Tbls. B-2 and B-4.

⁵⁶ *T-Mobile Declaratory Ruling* at ¶¶ 25-26.

Order.⁵⁷

Other factors specific to the circumstances of the individual case at hand, including those listed in the *Data Roaming Order* and the *T-Mobile Declaratory Ruling*, must also inform the Bureau's decision.⁵⁸ Solely using existing agreements' terms and rates to determine commercial reasonableness "could have the effect of perpetuating terms negotiated in prior years. A rate negotiated a year ago might have been commercially reasonable at that time but may no longer reflect current marketplace conditions, which is why the Commission limited this presumption to existing agreements and not to future negotiations."⁵⁹

This aspect of the *Order* is particularly problematic because AT&T is one of two carriers whose actions necessitated the *Data Roaming Order*.⁶⁰ The commercial mobile data service roaming rule exists primarily because AT&T refused to enter into commercially reasonable arrangements with smaller carriers.⁶¹ AT&T imposed great difficulties on requesting carriers and the Commission suspected the agreements it did make were attempts to defuse the issue.⁶² The Bureau's ruling that those very same agreements are presumptively commercially reasonable in the first fully litigated complaint filed against AT&T functionally overturns the *Data Roaming Order*. The Bureau's disposition uses the unreasonable agreements the Commission sought to eliminate as the benchmark for commercial reasonableness. The *Order*

⁵⁷ *Order* at ¶ 23 ("In the absence of other probative evidence, we find the data roaming rates in the roaming agreements that AT&T submitted in this proceeding ... are highly probative of the commercial reasonableness of AT&T's proposed data roaming rates.").

⁵⁸ *T-Mobile Declaratory Ruling* at ¶¶ 25-26.

⁵⁹ *Id.*

⁶⁰ *Data Roaming Order* at ¶¶ 24-27.

⁶¹ *Id.* at ¶¶ 24-25 ("We find that providers have encountered significant difficulties obtaining data roaming arrangements on advanced '3G' data networks, particularly from the major nationwide providers. ... We observe that AT&T has largely refused to negotiate domestic 3G roaming arrangements until recently, even though it launched its 3G service in 2005 and was providing coverage to 275 major metropolitan areas in May 2008.").

⁶² *Id.* at ¶ 27.

sanctions the *status quo* and entirely undercuts the primary goals of the *Data Roaming Order*, which was issued to end the *status quo*.

WCX presented a great deal of evidence that AT&T's proposed rates are commercially unreasonable. The best and most pertinent information presented by WCX was its recent roaming agreement with [REDACTED].⁶³ This agreement was executed during the pendency of the complaint and it contains the same rates proposed by WCX in this case. It was the result of a truly arms-length negotiation with a carrier that has not consistently fought the Commission's roaming rules at every turn. It is a far better representation of commercial reasonableness than the agreements cited by AT&T, many of which are years old and predate the *Data Roaming Order*.

The Bureau simply dismissed the [REDACTED] agreement out of hand and refused to give it any weight whatsoever.⁶⁴ According to the *Order*, it did not merit consideration because AT&T's LTE network is "superior" and AT&T does not intend to roam on WCX's network, which the Bureau held warrants higher roaming rates.⁶⁵ The Commission has never endorsed this view. The Bureau should have taken "an expansive approach" based on "the totality of the circumstances" when determining commercial reasonableness.⁶⁶ Furthermore, allowing the largest nationwide carriers to charge the highest roaming rates would undermine one of the primary justifications for the *Data Roaming Order*. The Commission found that a formal commercial mobile data service roaming rule was necessary in part because the two largest wireless carriers have such

⁶³ WCX Suppl. Resp. to AT&T Interrogatory No. 1, Tab 7 (Jul. 22, 2015).

⁶⁴ *Order* at ¶ 25.

⁶⁵ *Id.*

⁶⁶ *T-Mobile Declaratory Ruling* at ¶¶ 14 and 16.

expansive networks they have little incentive to offer commercially reasonable roaming.⁶⁷ The *Order* has now sanctioned the very problems the Commission was trying to solve.

The *T-Mobile Declaratory Ruling* held that complaining parties can present “a comparison of proffered roaming rates to domestic roaming rates as charged by *other providers*.”⁶⁸ The Bureau should have taken “a broad view of what could be relevant in determining commercial reasonableness” and not circumscribed consideration of potentially relevant factors.⁶⁹ The *Order* dismisses the [REDACTED] [REDACTED] agreement out of hand and limits its analysis solely to AT&T’s cherry picked collection of existing data roaming agreements. This fundamental error in analysis requires reversal.

VII. ERROR 3: The *Order* erred by holding that WCX failed to demonstrate that AT&T’s proposed rates substantially exceed retail rates.

The Enforcement Bureau additionally erred by holding WCX failed to demonstrate that AT&T’s proposed roaming rates are “substantially in excess of retail rates.”⁷⁰ A substantial difference between a host provider’s proposed rates and retail and international data rates constitutes evidence of commercial unreasonableness.⁷¹ WCX made a convincing demonstration that AT&T’s proposed rates are commercially unreasonable because they exceed the then-prevailing retail data rates in the United States by [REDACTED] [REDACTED] percent.

Although comparisons to retail and international rates are only two of the Commission’s

⁶⁷ *Data Roaming Order* at ¶ 27 (“[C]onsolidation may have simultaneously reduced the incentives of the largest two providers to enter into such arrangements by reducing their need for reciprocal roaming”).

⁶⁸ *T-Mobile Declaratory Ruling* at ¶ 9 (emphasis added).

⁶⁹ *Id.* at ¶ 15.

⁷⁰ *Order* at ¶ 26.

⁷¹ *T-Mobile Declaratory Ruling* at ¶ 9.

factors for assessing commercial reasonableness, they are critically important in a case such as this, where the host provider declines roaming on the requesting provider's network.⁷² That decision turns the roaming arrangement into a one-way transaction where the requesting carrier essentially purchases roaming without any prospect for generating off-setting revenues. Roaming rates substantially in excess of retail in this context will force the requesting carrier to limit its users' ability to roam⁷³ or charge uncompetitive prices, the precise dilemma now facing WCX. Neither option allows the requesting carrier to provide a competitive service. AT&T's rates constitute an unreasonable restraint on trade.

WCX demonstrated that, as of 2014, retail rates for data services were approximately \$0.01 per megabyte (MB) or \$10.00 per gigabyte (GB).⁷⁴ This is a fraction of AT&T's proposed roaming rates of [REDACTED]

[REDACTED] WCX's estimate, which was in fact conservative, was based on the advertised service offerings of Verizon Wireless, Cricket Wireless (which is owned by AT&T), T-Mobile, and AT&T.⁷⁶ This conclusion was consistent with a 2012 report by Gillot Research, Inc. that found the median retail data rate in the United States was \$0.012 and was only \$0.009 per MB for the four largest wireless carriers.⁷⁷ WCX further showed that international data roaming rates were also well below this estimate.⁷⁸ For instance, Canadian retail data rates ranged from \$0.0041 to \$0.0076 per MB according to a SeaBoard Group study.⁷⁹

⁷² *Order* at note 69.

⁷³ Roetter Reply Decl. at pp. 10 and 22.

⁷⁴ Roetter Decl. at pp. 13-14 (Second Amended Compl. at Bates pp. 167-68). *See also* Roetter Supp. Decl. at pp. 24-25 and Exhs. 14-21.

⁷⁵ AT&T Final Offer, Exh. 8.

⁷⁶ Roetter Decl. at pp. 13-14.

⁷⁷ Second Amended Compl., Second Amended Feldman Decl. Exhs. at Bates p. 1185, Tbl. B.

⁷⁸ Roetter Decl. at pp. 14-18.

⁷⁹ *Id.* at pp. 16-17.

European retail data rates varied widely, but were as low as \$0.70 per GB as of May 2013.⁸⁰

AT&T disputed WCX's calculation and advanced a flawed estimate that then-existing retail data rates ranged between [REDACTED] per MB.⁸¹ To reach this figure, AT&T examined only its own retail data plans (but excluded Cricket Wireless's lower rates) and then inflated the rates by simultaneously subtracting unused data from the calculation and including overage charges.⁸² AT&T referred to the result as its "effective data rate," although it better represents AT&T's retail data revenues, not its advertised prices available to the public. AT&T's figure was further distorted by the inclusion of line access charges, which are irrelevant to data roaming rates.⁸⁴

The Commission calculates retail data rates every year in the annual CMRS reports. Those reports match very closely to WCX's calculation of retail data rates of \$0.01 per MB and are well below AT&T's calculations of [REDACTED] per MB. The following charts are taken from the 2014 *Seventeenth Report*,⁸⁵ the 2015 *Eighteenth Report*,⁸⁶ and the 2016 *Nineteenth Report*:⁸⁷

⁸⁰ *Id.* at p. 17.

⁸¹ Orszag Supp. Decl. at pp. 12-14 and Appx. B, Tbl. B-5.

⁸² Roetter Supp. Decl. at ¶ 11.

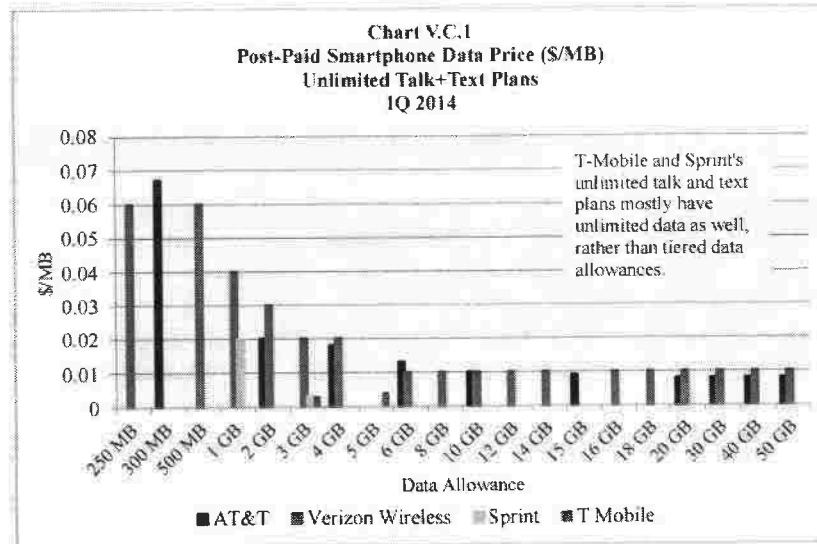
⁸⁴ *Id.*

⁸⁵ See *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, WT Docket No. 14-135 *Seventeenth Report*, 29 FCC Rcd 15311 (WTB 2014) ("*Seventeenth Report*") at p. 83, Tbl. V.C.1.

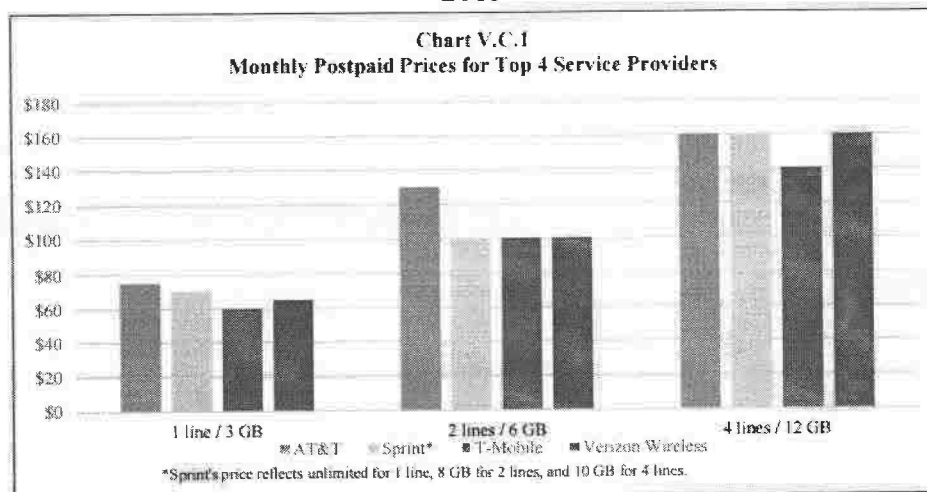
⁸⁶ See *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, WT Docket No. 15-125, *Eighteenth Report*, 30 FCC Rcd 14515 (WTB 2015) ("*Eighteenth Report*") at p. 66, Tbl. V.C.1.

⁸⁷ See *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, WT Docket No. 16-137, *Nineteenth Report*, __ FCC Rcd __ (WTB 2016) ("*Nineteenth Report*") at p. 65, Tbl. V.C.1. The 2014 and 2015 reports were both available to the Enforcement Bureau at the time the *Order* was issued.

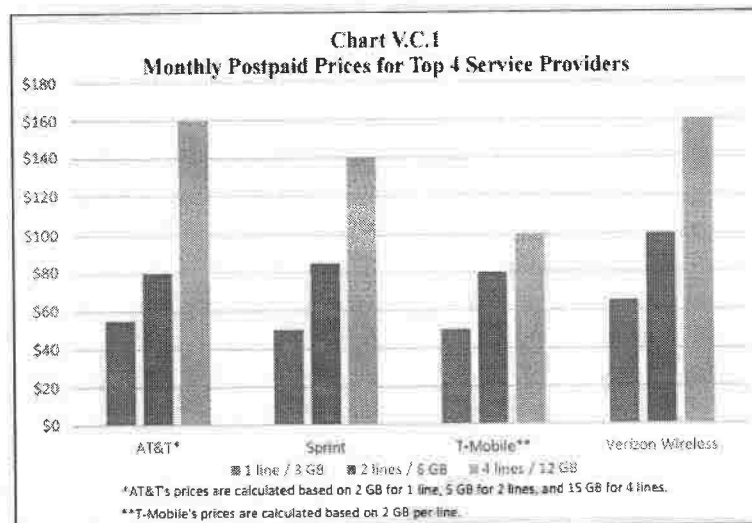
2014



2015



2016



AT&T's calculation of retail data rates between [REDACTED] per MB is not even close to the Commission's figures. The *Seventeenth Report* shows that retail data prices ranged from \$0.003 to \$0.066 per MB in 2014, and nearly two-thirds of the plans were priced below \$0.01 per MB. For 2015, the *Eighteenth Report* showed a range of \$0.011 to \$0.024 per MB. The *Nineteenth Report* showed retail data rates between \$0.008 and \$0.021 per MB, with most plans below \$0.015 per MB.

[REDACTED]
[REDACTED]
[REDACTED] Three-quarters (41) were priced below \$0.02 per MB. None went as high as [REDACTED] per MB. It should also be noted that the Commission reports omitted unlimited plans from their figures.⁸⁸ Thus, the Commission's findings completely validate WCX's estimate of \$0.01 per MB.

The *Order* erred by holding that AT&T's calculation of retail data rates is more accurate and therefore its proposed rates are not substantially in excess of retail prices.⁸⁹ [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

⁸⁸ *Seventeenth Report* at ¶ 166 ("One caveat is that this price is calculated only for plans with data allowances and excludes unlimited data plans. The price may be lower for some heavy users on unlimited data plans.").

⁸⁹ *Order* at note 75.

⁹⁰ *Id.*

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

The *Order* also erred by limiting its analysis of retail rates strictly to AT&T. The *T-Mobile Declaratory Ruling* did not endorse this concept that only the host provider's retail rates are pertinent. That is inconsistent with taking a "broad view" and it excludes relevant information.⁹³ WCX provided far more information supporting a calculation of prevailing industry retail data rates than AT&T. WCX's analysis is more accurate, reliable, and it is consistent with the Commission's annual figures.

The Bureau held that AT&T's Final Offer "falls within a range of commercially reasonable rates."⁹⁴ Instead, AT&T's rates are prohibitively expensive and an unreasonable restraint on trade. For example, if the average WCX customer's device consumes 3 GB while roaming in a single month as expected,⁹⁵ the charge to WCX would be at least [REDACTED]

[REDACTED]

[REDACTED]

⁹¹ Feldman Decl., Exh. III, Farrell Decl. at ¶ 65 ("These retail plans are not data-only. All of the plans considered here include unlimited domestic voice minutes and unlimited domestic SMS messaging.").

⁹² *Id.*

⁹³ *T-Mobile Declaratory Ruling* at ¶ 15 ("This language clearly reflects a broad view of what could be relevant in determining commercial reasonableness, and a determination not to circumscribe the Commission's consideration of potentially relevant factors.").

⁹⁴ *Order* at ¶¶ 18, 20, and 28.

⁹⁵ Feldman Reply Decl. at 7 and 80; and Roetter Suppl. Decl. at 16 (WCX projects that each device will use 3 GB of LTE roaming data per month).

[REDACTED] in June, 2016.⁹⁶ WCX cannot compete in the nationwide wireless broadband Internet access market if it must pay AT&T [REDACTED] per month in roaming charges for each customer, when AT&T sells its retail service at only a fraction of that price. AT&T has purposefully made it impossible for WCX and other carriers to have a competitively priced service that includes roaming.

VIII. ERROR 4: The Bureau erred by requiring that WCX present evidence the Commission itself has found is difficult to locate and analyze.

The Bureau erred in its evaluation of whether WCX carried its burden of proving that AT&T's proposed prices for commercial mobile data service roaming are not commercially reasonable under Section 20.12(e).⁹⁷ The *Order* refused to consider WCX's evidence of the prevailing retail data prices, the rates in domestic roaming agreements not involving AT&T, refused to consider international retail data rates, and limited its evaluation to AT&T's self-selected, skewed production and presentation.

The Bureau completely ignored the Commission's repeated findings in several recent reports that "there is wide variety of pricing plans offered by the different mobile wireless service providers that vary along several dimensions, and that may frequently change" and recognizing that it is "difficult to identify sources of information that track actual mobile wireless service prices in a comprehensive and consistent manner."⁹⁸ WCX did an extraordinary survey

⁹⁶ See *Nineteenth Report* at p. 65, Tbl. V.C.1.

⁹⁷ As noted earlier, if the Bureau had enforced the automatic roaming rule, the burden and applicable standard would have been much different. WCX's request would have been presumed reasonable and AT&T would have the burden of proving its prices, terms and conditions are just and reasonable and not unreasonably discriminatory under §§ 201 and 202 of the Act. The outcome would have necessarily been much different.

⁹⁸ *Eighteenth CMRS Report* at ¶¶ 26 (n. 54) and 104; *Seventeenth Report* at ¶166 ("it is difficult to calculate a meaningful estimate of average revenue per megabyte actually being paid by

of prevailing domestic and international roaming and retail prices, but the Bureau ignored it all and then held that WCX had failed in its burden. The Bureau's finding that prevailing retail rates range from [REDACTED] is flatly and patently inconsistent with the Commission's own contemporaneous official estimate for AT&T and the industry at large in the *Seventeenth* and *Eighteenth Reports* and later the *Nineteenth Report*. The Bureau imposed an impossible and impermissible burden of proof on WCX.

IX. CONCLUSION

The *Order* ratifies unjust, unreasonable and not commercially reasonable prices for interconnected services. AT&T's roaming rate is far above prevailing retail rates, and is so high that WCX will be forced to cap roaming use and block its users' ability to enjoy Internet access when they are roaming on AT&T's network.⁹⁹ WCX will be precluded from the nationwide commercial mobile data service market and limited to offering only nationwide voice, texting and other low-bandwidth interconnected services like M2M.¹⁰⁰ In other words, WCX will only be able to use AT&T's roaming for interconnected services, even though the *Order's* entire analysis pertained to non-interconnected commercial mobile data service roaming under Section 20.12(e) and the Bureau refused to even consider the automatic roaming rule. If the Commission does not reverse the *Order*, WCX can only engage in and use automatic roaming because the Bureau has priced WCX out of the nationwide commercial mobile data service market.

The *Order* erroneously failed to enforce and apply the automatic roaming rule. AT&T

consumers without knowing the composition of plans for each provider, the uptake rates for various plans, non-advertised promotions, and the proportion of legacy plans in a provider's customer base. It is possible, however, to understand overall trends....").

⁹⁹ Roetter Reply Decl. at pp. 10 and 22.

¹⁰⁰ WCX's M2M service will have traditional phone numbers and will be able to communicate with all end-points on the legacy public switched network. See Feldman Reply Decl. at p. 59, ll. 11-16.

did not offer LTE-based automatic roaming for interconnected services and text messaging on just, reasonable and non-discriminatory terms. AT&T's automatic roaming obligation does not go away simply because WCX's users will be roaming on AT&T's LTE network when using their interconnected voice and data services. The *Order* also erred by holding that WCX did not meet its burden of demonstrating that AT&T's proposed rates for commercial mobile data services are commercially unreasonable. The Bureau refused to consider relevant evidence regarding retail prices and other carriers' roaming rates and relied on the wrong evidence. WCX respectfully requests that the Commission reverse the *Order* and remand the complaint to the Enforcement Bureau.

Respectfully submitted,

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October 24, 2016

CERTIFICATE OF SERVICE

I hereby certify that on October 24, 2016, I caused the foregoing Application for Review to be delivered to Mssrs. James Bendernagel, Paul Zidlicky and Kyle Fiet, SIDLEY AUSTIN LLP, by email.

/s/ Matthew A. Henry
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